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**CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage¹
and UNITE HERE! Local 878, AFL–CIO.** Case
19–CA–215741

May 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On November 14, 2019, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Charging Party, UNITE HERE! Local 878, AFL–CIO, filed exceptions and a supporting brief. The Respondent, CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage, filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. May 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

¹ Consistent with the joint stipulation of facts into which the General Counsel and the Respondent entered and the amendment of the pleadings granted by the judge at the hearing, we have amended the caption to correctly identify the Respondent.

² In dismissing the allegation that the Respondent unlawfully discharged Noberto “Bill” Rosario, we affirm the judge’s finding that the Respondent established it would have discharged Rosario for covering up and failing to report mold even in the absence of his protected activity. We find that *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), does not apply here because the misconduct for which Rosario was discharged did not occur in the course of protected activity. In any event, even if *Burnup & Sims* did apply, the judge correctly found that the General Counsel failed to establish that Rosario was not, in fact, guilty of that misconduct.

(SEAL) NATIONAL LABOR RELATIONS BOARD

Carolyn McConnell, Esq., for the General Counsel.
Douglas S. Parker, Renea I. Saade and Sean Halloran, Esqs.
(Littler Mendelson P.C.), for the Respondent.
Laura Ewan, Esq. (Barnard Iglitzin and LaVitt, LLP), for the
Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on February 19–22 and March 1, 2019, in Anchorage, Alaska. Based on a charge filed by UNITE HERE! Local 878, AFL–CIO (Charging Party, the Union or Local 878) in the above-captioned case, the Regional Director for Region 19 issued a complaint on October 30, 2018 (the complaint). The General Counsel alleges that Respondent CP Anchorage Hotel 2, LLC d/b/a Hilton Anchorage (Respondent or the Hotel)¹ violated the National Labor Relations Act (the Act) by discharging union adherent Noberto “Bill” Rosario (Rosario) in retaliation for his union and other protected conduct. As set forth below, I find no merit to the complaint and recommend that it be dismissed.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs. On April 22, 2019, posthearing briefs were filed by the parties and have been carefully considered.² Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it is a Delaware limited liability company with an office and place of business in Anchorage, Alaska, where it is engaged in the business of operating a hotel known as the Hilton Anchorage. In conducting its business operations during the 12-month period immediately preceding the issuance of the complaint, Respondent derived gross revenues in excess of \$500,000. During the same time period, Respondent purchased and received at its Anchorage hotel property goods valued in excess of \$50,000 directly from points outside the State of Alaska. Accordingly, I find that Respondent is an

¹ At hearing, the parties stipulated as to Respondent’s correct name.

² Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh. ___” for General Counsel’s Exhibit; “R. Exh. ___” for Respondent’s Exhibit; “CP Exh. ___” for Charging Party’s Exhibit and “Jt. Exh. ___” for Joint Exhibit. On April 2, 2019, the parties filed a joint motion to correct the placement of certain exhibits in the record. That motion is hereby granted, meaning that R. Exhs. 2–25, 26(a), 28–51 and 53 and GC Exhs. 1–30, 31(a), 34–36 and 38–40 which were admitted, should be deemed included in the admitted exhibit file, and that R. Exhs. 1, 26(b) and 27 and GC Exhs. 31(b), 32, 33 and 37, which were rejected, should be deemed included in the rejected exhibit file.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

I. THE ALLEGED UNFAIR LABOR PRACTICES

On October 9, 2017, Rosario was discharged following an investigation into his response to discovering the presence of mold in two hotel guestrooms.³ As described in more detail herein, the parties agree that, in each room, after discovering the mold, he photographed it, “cleaned” it, glued wallpaper over it and sent the images to the Union. They disagree, however, as to whether he was instructed by a Respondent agent or supervisor to cover up the mold and whether he reported its presence to Hotel management. As such, witness credibility was a central feature of this case.

I based my credibility resolutions on consideration of a witness’ opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness’ testimony; the quality of the witness’ recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence and witness demeanor while testifying. My credibility findings, which are generally incorporated into the findings of fact set forth herein, dictate that Rosario’s discharge did not violate the Act as alleged.

A. Factual Background

At the time of his discharge, Rosario was a 10-year Hotel employee represented by Local 878. He worked as a maintenance technician, which involved performing general repairs throughout the Hotel, such as addressing plumbing, heating and air-conditioning issues. Rosario was considered talented at his job; his direct supervisor, Chief Engineer Bill Best (Best) often praised his work and referred to him as “my magician.” Rosario was nominated for employee of the month on four occasions and actually received the award in 2016. (Tr. 250, 252–253, 256, 262–263, 272, 311, 382–384; GC Exhs. 9, 10.)

For a decade, Respondent and the Union have failed to reach a successor agreement to an expired collective-bargaining agreement covering Hotel employees, and the Union has, during that time, engaged in a boycott and informational campaign against the Hotel. Rosario was an open union supporter. He wore a union button to work each day, attended bargaining sessions and union rallies observed by management and signed several pro-union petitions. While in the presence of managers in an employee breakroom, he handed out buttons to his coworkers, spoke with union organizers and encouraged his coworkers to attend negotiations. (Tr. 128–129, 131–133, 135, 264–270, 326–327, 392–393, 396–397, 426–427, 431–423, 815, 1034; GC Exhs. 25, 27–30.)

³ Unless otherwise indicated, all dates herein refer to the year 2017.

⁴ I credit the testimony of former Managers Andrew Stansfield and Janine Babusch as to these remarks by Tokman; they each testified in a forthright manner without embellishment. Nor do I find their testimony

1. Mold as a health and safety issue at the Hotel

Mold resulting from earthquake damage, including broken water lines, presents a health and safety hazard in Anchorage hotels, such as Respondent’s. In early 2014, Rosario began reporting problems with working conditions at the Hotel to the Union, including mold. Between 2014 and his discharge, he also photographed these working conditions for the Union, providing it with approximately 30 images, 20 of which showed instances of mold. The Union posted Rosario’s pictures on its website dedicated to the Hotel’s mold problem, aptly named “hiltonanchorage-moldreport.org.” (Tr. 124–125, 450–452, 709; Jt. Exh. 6.)

In May 2014, the Union assisted unit employees in filing complaints with OSHA about mold in the Hotel, which resulted in the agency conducting three surprise inspections during the remainder of that calendar year. Beginning in 2015, the Union held protests in front of the Hotel on various issues, including health and safety, with four or five demonstrations devoted solely to the subject of mold-related problems. The Union also served the Hotel with several information requests related to mold conditions at the property. (Tr. 393–396, 412–415, 709, 731–732; GC Exhs. 13–22.)

Since at least 2015, the Hotel’s upper management appears to have been aware that Rosario was responsible for supplying the Union with mold photos. Bill Tokman (Tokman), who served as General Manager until September 2016, made it known that he suspected Rosario of being the “mole” responsible for the images on the Union’s website, and did so in the presence of Director of Operations Soham Bhattacharya (Bhattacharya), who would later take over as General Manager. In November 2015, Tokman even considered denying a vacation request submitted by Rosario with the aim of declaring him a “no call/no show” and discharging him. This, he told managers not including Bhattacharya) would “stop the mole.”⁴ He never carried out the plan, instead approving Rosario’s vacation; later, however, he expressed regret at having done so. In February 2016, Tokman referred to Rosario as a “troublemaker” and commented, “[w]e should’ve let him go when we had the chance.” (Tr. 68–77, 79, 565–567.)

In 2017, the Union lobbied the Anchorage Assembly (the city’s governing body) to enact legislation specifically governing mold in the city’s hotels, including providing whistleblower protection for individual employees who reported hotel mold. This effort involved a public assembly meeting on September 12 and a work session (in which union representatives spoke in favor of the draft bill) on October 6. Two of Respondent’s represented employees, but not Rosario, gave testimony in support of the legislation. The mold ordinance was voted into law on October 10. (Tr. 422–423, 494–495; Jt. Exh. 6.)

2. Respondent’s mold remediation policies

Respondent maintains no written policy on employee responsibilities with respect to mold, but numerous management witnesses, as well as two current-employee witnesses and Rosario himself, testified that the established protocol was that, upon

impeached by business records offered by Respondent, which appears to demonstrate only that Tokman was considered denying Rosario’s vacation retroactively after it had already begun.

discovering any substance suspected of being mold, employees were expected to report immediately to Chief Engineer Best, or, in his absence, their direct supervisor. According to the Hotel's former Director of Human Resources, employees were explicitly instructed in official training sessions that they were not themselves to touch mold or attempt to clean it up. (Tr. 78, 279, 568–569, 578, 693–694, 920, 1027.)

After Best (or another supervisor) received a report of mold in a guest room, the room would be placed “out of order,” meaning that it could not be let out to a guest. Individual maintenance technicians, such as Rosario, also had the individual authority to designate a room “out of order” by informing the front desk of the room's number. After a room was so designated, upper management would arrange for an outside contractor specializing in mold abatement to inspect and test the substance. Upon confirmation that it was mold, Best would then put a “hard block” on the room, deactivating key card access for Hotel employees such as housekeeping and maintenance.⁵ Rosario regularly followed this policy; on several occasions, he personally designated a room “out of order” for suspected mold. (Tr. 273, 345, 347–348, 627, 727, 921, 923–924.)

3. Events of August 19, 2017

The conduct at the heart of this case took place in two hotel guestrooms on August 19th. The sole witness who testified as to these events is Rosario himself. According to him, he was requested by a female “room supervisor” to replace peeling wallpaper in rooms 534 and 826. Room supervisors (who are also called “housekeeping supervisors” and/or “room inspectors”) are responsible for relaying work orders from managers, individual housekeepers or guests themselves to maintenance technicians on duty. While maintenance technicians are expected to respond to all work orders as relayed by the room supervisors, multiple witnesses testified that room supervisors do not direct the maintenance technicians as to *how* to perform specific repairs. (Tr. 263–264, 277–278, 287–288, 291–293, 298, 543–548, 842, 844, 965.)

Rosario testified that, on August 19, a room supervisor summoned him to room 826, where she showed him loose wallpaper behind a toilet. According to him, she asked him to reattach it, explaining that the room was a “CRM.” This acronym, which stands for “Customer Really Matters,” denotes a priority repair for a room assigned to a Hilton Honors member or some other high-profile guest. Then, according to Rosario, she showed him room 534 and again requested that he reattach some wallpaper that had separated from the sheetrock. When he was originally shown the detached wallpaper in each room, Rosario testified, he did not see mold behind it, nor did the room supervisor indicate that there was mold underneath that should be covered up. At hearing, Rosario could not recall the name of the room supervisor in question, and the General Counsel failed to present the testimony of any room supervisor who had interacted with him in either of the rooms in question. (Tr. 291–292, 326–327, 887–888.)

⁵ I decline to make an inference, as urged by the General Counsel, that Respondent did not consistently enforce its policy of hard blocking rooms with reported mold. While witnesses' recollection of the number of blocked rooms was inconsistent with certain figures Respondent

Reattaching peeling wallpaper with spray glue is not an uncommon task for a maintenance technician and takes only a few minutes; at the time he entered the rooms, Rosario had spray glue with him, but inexplicably did not reattach the wallpaper at that time. Instead, he testified, he left and returned to the rooms only after responded to all of the previous work orders he had received that day. According to him, this is when he noticed that there was mold underneath the wallpaper, photographed it with his smart phone, “cleaned” it with a product called “ZEP” and re-glued the wallpaper. Although he was admittedly concerned about the presence of the mold, he did not alert the room supervisor who had initially summoned him to the rooms, the Director of Housekeeping or any other manager. It is undisputed that Best was not working on August 19. (Tr. 264, 289, 328–329; GC Exh. 3.)

Despite acknowledging that he was aware of—and in fact had historically followed—Respondent's established mold reporting protocol, Rosario attempted at hearing to develop a counternarrative that legitimized his failure to comply with it on August 19. This testimony, however, was disjointed to the point of incoherence. In addition to not explaining why he left a simple, high-priority repair until he had completed other work orders, only to return once the room supervisor was gone, he also admitted that, prior to this occasion, he had never glued wallpaper to cover up mold at the Hotel, and further admitted that nobody explicitly instructed him to glue wallpaper over mold in rooms 534 and 826. Nonetheless, when asked point-blank why he had done just that, he responded, “[b]ecause that's what they asked me to do. They gave me the order, and that's what I did.” Without identifying who specifically issued this order, he was markedly evasive, claiming “when there's mold, I'm supposed to clean it and then glue it back up, and that's what I did, what they told me I should do.” (Tr. 287–288, 293–295, 309–310, 327–329.)

Next, Rosario cast around for a wider rationale for his conduct, claiming that, at some prior occasion, he had been instructed to use ZEP to remove mold. Pressed, however, he admitted that he had never been explicitly instructed to use this product on walls, but rather to “touch up” mildew on tiles. He then claimed that he and other unnamed maintenance technicians nonetheless had a long-standing practice of using ZEP to clean up mold on walls, but this testimony was contradicted by other witnesses, including the only other maintenance technician to testify, Clark. Finally, Rosario also claimed that, at some point in 2017, former Director of Housekeeping Ivan Tellis (Tellis) had ordered him to cover up mold in some manner. This testimony, however, was contradicted by Tellis' far more credible denial. (Tr. 279–280, 320–321, 632, 858–859, 920.)

I cannot credit Rosario on the various means by which he had supposedly been empowered to ignore Respondent's established mold protocol. Apart from the inherent implausibility of his inability to recall the identity of the only witness who could corroborate his account, his demeanor itself strongly detracted from his credibility. He appeared to struggle through this testimony,

reported to the Union, this is not a sufficient basis on which to base an inference, especially considering that more definitive evidence on the issue could have been adduced on the record.

his noticeably distraught comportment suggesting that he had not convinced himself of his own story.

4. Rosario's subsequent conduct

On August 22, Rosario sent images of the mold he had concealed to Local 878 organizer, Dayra Valades (Valades). Two days later, pursuant to the Union's internal verification policy, Valades questioned him about the circumstances in which he took them. I credit Valades' account of this conversation; she presented as a no-nonsense witness with a sharp memory of events. According to her, Rosario assured her that "somebody in the housekeeping department" had explicitly asked him to clean up mold on the walls and cover it up with wallpaper, and that he had complied with this request only after speaking with Best by telephone to get "direction." (Tr. 120, 135–136, 142–143, 198–200, 287, 298, 363; GC Exhs. 4, 5.)

At hearing, Rosario claimed not to recall the specifics of what he discussed with Valades and testified that, rather than having called Best for guidance before reattaching the wallpaper, he actually told him about the rooms three days later, on August 22, when both men were next scheduled to work. According to him, he and Best joked about the situation at that point and agreed that "this is what they want, this is what they get." Best, for his part, testified that Rosario never brought mold in either room to his attention. I credit Best in this regard. His overall demeanor suggested to me that he was genuinely uneasy giving testimony obviously adverse to Rosario, his formerly coveted "magician," but was nonetheless committed to telling the truth. (Tr. 296–297, 363, 629.)

5. The Union's publication of Rosario's photographs and Respondent's initial investigation

On September 26, the Hotel's General Manager Bhattacharya received an email forwarded by a Regional Vice President of Respondent's parent company. The original email, written by the general manager of another Hilton property, forwarded an email *he* had received from a union email account. That email, dated September 25, stated in part:

Subject: New Mold in rooms 534 & 826

More bad news. New instances of mold were found at the "Unacceptable" Hilton Anchorage's Room 534 and 826 in August 2017. See pictures *here* and *here*.

Hyperlinks attached to the underscored terms took Bhattacharya to Rosario's pictures of the rooms in question posted on the Union's hiltonanchagemoldreport.org website. (R. Exh. 28; Tr. 686–687, 759–762.)

Bhattacharya immediately referenced a list he kept of guestrooms in which mold had been remediated and confirmed that

neither 826 or 534 was included. He then contacted Chief Engineer Best, Director of Housekeeping Tellis and Assistant General Manager Steve Rader (Rader), who each denied being aware of mold having been discovered in either room. Bhattacharya voiced his suspicion to Best that Rosario was responsible for the images; then, the two, accompanied by Tellis and Rader, inspected room 534. After pulling back wallpaper in the spot indicated by the website photograph, they discovered mold on the sheetrock underneath. (Because room 826 was occupied at the time, they waited until the following day and then discovered the mold Rosario had photographed and covered up in that room). (Tr. 628, 642–642, 761–765, 885, 894–896.)

After inspecting room 534, the managers conducted a "key interrogation" on the two rooms for the month of August; this involves downloading a log of card key entries into each room.⁶ The key interrogatory logs showed that two maintenance employees—Rosario and Clark—had entered each of the rooms in August. Then, Rader, who had downloaded Rosario's pictures onto his smartphone, noticed that the picture of room 534 had a "timestamp" of 12:46 p.m. on August 19, which had been revealed by his phone's photograph application.⁷ Rader then downloaded both pictures to his desktop computer and was able to determine by examining their underlying metadata that each had been taken with a particular Android smartphone model known as an "HTC Desire 610."

The managers next compared the timestamp of the room 534 photo to the room's key interrogatory log, which indicated that several employees had been in the room on August 19, including Rosario, housekeeping employees Maria DeCruz (DeCruz) and Anita Vasilevska (Vasilevska), a third, unknown housekeeping employee and maintenance technician Clark. Unlike the other employees, however, Rosario had entered the room 3–4 minutes before the picture had been taken.⁸ In order to confirm that Rosario was, in fact, the photographer, the managers devised a scheme whereby Best ordered Rosario to photograph a pipe in the Hotel's basement and send it to him. Rosario complied, and the metadata embedded in the image he sent indicated that it had been taken with an HTC Desire 610. (Tr. 767–768, 787, 789–790, 898–905, 959, 1055; R. Exhs. 29, 30, 31, 32, 49.)

6. Rosario's October 9 investigatory interview

On October 9, Rader contacted Business Representative and Vice President of Local 878 Daniel Esparza (Esparza) and requested that he attend a meeting regarding Rosario later that day. The approximately 2-week delay in scheduling the meeting was occasioned by Rader's absence from work for an out-of-town management training program. (Tr. 382, 454–455, 885, 945.)

The meeting was attended by Bhattacharya, Rader, Valades, Esparza and Rosario himself.⁹ Rader took the lead, stating that

⁶ Respondent's Director of Security Charles Selden testified that running such reports was a relatively common occurrence; prior to Rosario, at least one employee had been discharged based on information discerned from such a report. (Tr. 830–831, 1055.)

⁷ While Rader testified that the 12:46 p.m. photograph was of room 826, the documentary evidence indicates that the room in question was in fact room 534. I attach no significance to this misstatement, as I generally found Rader to be a forthright witness. (Tr. 899–900.)

⁸ Oddly, the log for room 826 indicates that Rosario was present in that room on August 12, 18 and 31, but not August 19, as he testified. This went unaddressed by the parties but further undercuts his claim that his actions in that room occurred as a result of a last-minute order to ready a room for a "CRM." (See R. Exh. 30.)

⁹ My recitation of the course of this meeting is based on a review of tape recordings and transcriptions made by Local 878 and Respondent. See R. Exhs. 13, 14; CP Exhs. 1, 2. While the parties' respective

they were there to discuss misconduct that might carry consequences; he then presented Rosario with the photographs and asked if he had taken them. Rosario denied that he had. Rader asked him what type of phone he used, and Rosario responded that it was an HTC. Esparza jumped in, questioning whether management had a problem with someone taking the pictures in question, which Bhattacharya and Rader immediately denied. Rader then stated that he had extracted metadata from the images, which showed him what type of device took the images, as well as the time and date it was taken. Rader stated that Rosario had failed to report the mold when he photographed it, and that the Hotel was therefore unable to address it. He then asked Rosario if he was familiar with the protocol for dealing with mold, and Rosario responded that he knew that he was not to “even look at it” but rather report it to Best. Esparza continued to run interference, challenging whether management was taking issue with employees documenting their working conditions; again, Bhattacharya insisted that this was not the issue and added that employees were free to take photographs at work and share them as they wished.

Rader then explained that management had compared the key interrogatory log to the time/date stamp on one of the images and confirmed that Rosario was the only maintenance employee who had been in the room at the time the photos were taken; he again asked Rosario if he had taken the pictures. Rosario again said no, but then added that sometimes he reported mold to Best, who failed to follow up. After Bhattacharya pressed him, Rosario stated that he now remembered the rooms and that he *had* reported them to Best by telephone. He then claimed that an individual named “Zenaida”¹⁰ had instructed him to re-glue the wallpaper in the rooms. Asked again whether he had reported the situation to Best, he responded that he was “pretty sure” that he had. Bhattacharya then stated that Best had no recollection of him reporting the rooms, to which Rosario responded that Best had trouble remembering a lot of things. At that point, Bhattacharya stated that management was still investigating the incident and would get back to Esparza within a couple of hours.

7. Management’s additional investigation and Rosario’s discharge

Following the meeting, Battacharya and Rader took steps to verify the version of events Rosario had related. Their review of work schedules indicated that neither Best nor a housekeeper named Zenaida Del Pilar (Del Pilar) had worked on the 19th. Battacharya re-interviewed Best, who confirmed that he was not at work that day and re-confirmed had not been contacted by Rosario about mold in either room 826 or 534. The managers also reviewed the Hotel’s occupancy rate for the 19th, which was relatively low, casting doubt on Rosario’s claim that refastening the wallpaper in one of the rooms had been a priority assignment. (Tr. 629, 802, 945, 963–965; R. Exhs. 33, 34, 50.)

transcripts conflict in some minor regards, I found these discrepancies immaterial to my analysis, except as otherwise noted.

¹⁰ Although the Union’s transcription of the meeting indicates that the individual Rosario referred to was named “Tamika,” I found this inconsistent with the witnesses’ recollection and the underlying recordings of the meeting. (Tr. 801–802, 944, 966.)

Even though Rosario had admitted to covering up the mold in rooms 826 and 534, Battacharya and Rader also interviewed Clark, who was the only other maintenance technician present in those rooms on August 19. Clark denied any involvement and allowed management to inspect his cell phone, which was an older style, analog phone, as opposed to an HTC model of the type that had captured the images in question. Neither Del Pilar (who was not at work on October 9) nor housekeeping employees DeCruz or Vasilevska was interviewed; as Rader explained, this was in large part because, as housekeeping employees, they were not issued spray glue and were thus presumably incapable of reattaching wallpaper. (Tr. 800–801, 846, 854, 926, 946, 958–959, 1041–1043.)

8. Rosario’s discharge

After consulting legal counsel, Bhattacharya and Rader concluded that Rosario had violated Hotel policy by covering up the mold and failing to bring it to the attention of management, and that discharge was appropriate. (Tr. 811, 814, 966, 969.) Two to three hours following Rosario’s initial investigatory interview, the five attendees regrouped. Rader reported that Best had denied being told about the mold, and therefore Rosario was being discharged.¹¹ Rosario was issued a written discharge letter which stated:

The reason for your termination is that it has recently come to management’s attention that you repaired the wallpaper in Room 534 on August 19, 2017 and failed to report the visible presence of mold.

(Jt. Exh. 3.) Following his discharge, Rosario was escorted off the property; Rader briefly considered having him leave through the lobby with his large, wheeled toolbox (to avoid stairs placed at the regular employee entrance), but after Esparza objected, a less public route was selected. (Tr. 461–463, 975.)

As noted, Del Pilar was not at work on October 9; the following day, however, Bhattacharya and Rader interviewed her. Presented with Rosario’s photographs, she confirmed that she had never spoken to Rosario about room 826 or 534 and signed a statement to that effect. She testified consistently at hearing, confirming that she understood Respondent’s mold reporting policy and had never asked Rosario to cover up mold. Battacharya also followed up with Best the day after Rosario’s discharge, at which point Best provided him with a statement denying that Rosario had reported the rooms in question, as well as a copy of his telephone bill, which disclosed that he had not received any call from Rosario on the 19th. (Tr. 645–652, 802, 807, 914–917, 945, 1061; R. Exh. 21, 36.)

A. Analysis

In a typical adverse action case, the Board relies on its “mixed motive” test set forth in *Wright Line*.¹² Under this test, if the

¹¹ Rosario, for his part, testified that Rader in fact stated that he was being discharged because he had taken pictures of the two rooms, but this was denied by the remaining witnesses, including his own representative, Esparza. (Tr. 305–306, 460.)

¹² See 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

General Counsel makes a *prima facie* showing that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct." *Id.* An employer may typically meet this burden by demonstrating that its decision was based on a good-faith belief that the employee engaged in misconduct and is not required to demonstrate the correctness of this belief. In such a case, whether the employee actually engaged in the alleged misconduct is irrelevant to the merits of the case. On occasion, however, the government's theory of liability dictates otherwise, rendering necessary a determination on the issue of the employee's underlying conduct.

In the instant matter, the General Counsel asserts two theories of liability. First, it contends that Respondent was motivated not by Rosario's covering up and failing to report mold, but rather seized on this conduct in order to rid itself of a known union supporter. This is a mixed-motive theory calling for a *Wright Line* analysis. See, e.g., *Waste Management of Arizona*, 345 NLRB 1339 (2005). However, the government alternately argues for a violation based on the Supreme Court's *Burnup & Sims* standard. In that case, the Court established an enhanced protection for employees disciplined for alleged misconduct taking place in the course of otherwise protected conduct. In such cases, the Board declines to extend the "good faith belief" defense and will find the employer's action lawful only where the employer's belief is ultimately proven to be correct.¹³ Accordingly, because Respondent claims to have discharged Rosario for alleged misconduct occurring in the course of his documenting working conditions at the Hotel, the General Counsel argues that Respondent's reasonable, good-faith belief does not carry the day, and Respondent will have violated the Act if its belief was mistaken.¹⁴

1. *Wright Line*

As noted, the General Counsel argues, pursuant to *Wright Line*, that Respondent was not, as it claims, motivated by Rosario's covering up and failing to report mold, but rather seized on this conduct in order to rid itself of a known union supporter.

Initially, I find that the General Counsel has carried his initial *Wright Line* burden of showing that Rosario's discharge was unlawfully motivated. The evidence demonstrates that, for years prior to his discharge, Rosario engaged in open union activity of which Respondent's managers and supervisors—including decisionmakers Bhattacharya and Rader—were well aware. Moreover, ample animus is evidenced by remarks by Respondent's former general manager, who was so indignant over Rosario's role as the Union's *de facto* "mold photographer" that he had even

considered engineering a pretext for discharging him. I also find a degree of animus revealed by the fact that, before completing his investigation, Bhattacharya suspected Rosario of being responsible for the August 19 photographs. I note, however, that the General Counsel adduced no evidence that a desire to discharge him, as opposed to determine how rooms 826 and 534 had gone unaddressed, was what precipitated the investigation in the first place. Cf. *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003); *Kiddie, Inc.*, 294 NLRB 840, fn. 4 (1989), and cases cited therein.¹⁵

The burden thus shifts to Respondent to show by a preponderance of the evidence that it would have discharged Rosario even in the absence of his known union activity. As noted, under the *Wright Line* standard, Respondent need not prove that Rosario failed to report mold and/or covered it up in the absence of a legitimate order to do so, but only that it reasonably believed that he had. See *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002) (citations omitted). I find that Respondent has done so. That the Hotel takes mold seriously and expects employees to report it in a timely manner is well established throughout the record. Upon viewing the Union's online images of rooms 826 and 534, Bhattacharya, as the Hotel's top executive, immediately headed up an extensive investigation into what had occurred. Objective evidence, in the form of computer metadata and Respondent's key interrogatory logs, led inexorably to Rosario, who prevaricated wildly when interviewed and ultimately offered a thoroughly implausible explanation that was contradicted by multiple sources.

Under the circumstances, I find that Respondent had a reasonable, good-faith belief that Rosario had engaged in misconduct of a serious nature, as substantiated by Respondent's own thorough investigation. *Cordua Restaurants, Inc.*, 366 NLRB No. 72, slip op. at 4 (2019); see also *DTR Industries*, 350 NLRB 1132, 1135–1136 & fn. 29 (2007) ("[g]iven the magnitude of the financial loss caused by this 2-day spurt of ruined production, and the Respondent's careful elimination of other bases to explain the production errors," the respondent established its reasonable belief that the employee intentionally produced defective products), *enfd.* 297 Fed.Appx. 487 (6th Cir. 2008) (unpublished); *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989) (finding respondent met its *Wright Line* burden by establishing that it would have suspended the employees, even in the absence of their protected activity, because based on its investigation, it reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself), *enfd.* 924 F.2d 1055 (5th Cir. 1991) (unpublished).

The General Counsel and Charging Party argue that, despite

¹³ See *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). As the Court explained, this approach aims to provide employees heightened protection against meritless suspicions of misconduct allegedly committed in the course of protected conduct. *Id.* at 23–24.

¹⁴ Charging Party, by its posthearing brief, argues that I should find that Respondent unlawfully discharged Rosario based on what appears to be a typographical error in Respondent's answer to the complaint. This however, is not a theory of liability asserted by the General Counsel, so I decline to consider it. See *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1 fn. 2 (2016) ("It is well settled that a charging party

cannot enlarge upon or change the General Counsel's theory of a case") (citing *Kimtruss Corp.*, 305 NLRB 710, 711 (1991) (judge erred in finding an 8(a)(1) violation based on charging party's theory as well as the General Counsel's theory)).

¹⁵ Charging Party, by its brief, appears to suggest that Rader's aborted attempt to have Rosario exit, postdischarge, through the Hotel's lobby evinces further evidence of animus against him; I disagree and credit Rader's testimony that he simply wanted to accommodate Rosario's large, wheeled toolbox.

this evidence, I should find that Respondent's decision to discharge Rosario was in fact unlawfully motivated. Chiefly, they contend that management's "seemingly thorough investigation" was in fact pretextual, as evidenced by its failure to investigate housekeeping employees DeCruz and Vasilevska's potential involvement in the wrongdoing. Although neither had been named by Rosario as having been involved, the General Counsel argues, they should have been interviewed, because the key logs showed that they had been present on the day in question and therefore may have also violated Respondent's mold-reporting policies. I disagree.

Other than an instance of prior reliance on a key interrogatory report, the record contains no evidence of Respondent's standards or historical practices for investigating employee misconduct. Thus, there is no evidence that historically, upon discovering mold in hotel rooms, Respondent has undertaken an investigation into every employee who may have failed to report it. In the absence of evidence of such a standard or practice, finding suspect Respondent's failure to interview additional employees would amount to me, as the trier of fact, substituting my business judgment for that of Respondent, which is inappropriate to my role. See *Ryder Distribution Resources*, 311 NLRB 814, 816–817 (1993); see also *Texas Instruments v. NLRB*, 599 F.2d 1067, 1073 (1st Cir. 1979) (the issue is "not to determine how the Board would have behaved under similar circumstances but to determine what in fact motivated the employer"); *FPC Advertising Inc.*, 231 NLRB 1135, 1136 (1977) (employer's business conduct is not to be judged by any other standard other than which it has set for itself). I likewise decline Charging Party's invitation to second guess the level of discipline imposed on Rosario, based on his tenure and value to the hotel. See *Sam's Club*, 349 NLRB 1007, 1009 fn. 10 (2007) ("[A]s we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision") (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)).

On a more granular scale, the General Counsel points out that Respondent interviewed Del Pilar only after discharging Rosario. This is hardly surprising, considering that it had been determined that she was not even at work on the day Rosario claimed that she ordered him to cover up mold. Nor am I convinced, as the General Counsel urges, that Respondent's interview of Rosario demonstrated pretext. In this regard, I decline, for the reasons stated, supra, to second guess Respondent's decision to interview Rosario (who did not request an interpreter) in English, his second language. Nor do I agree that Bhattacharya and Rader somehow tried to "trick" him during the interview by mischaracterizing his answers to their questions. The recording of the interview reveals that, within minutes, Rosario changed his story from knowing nothing about the rooms to having reported mold in them to Best. Under the circumstances, I find that Bhattacharya and Rader were legitimately attempting to address his dissembling.¹⁶ In short, I find nothing suspicious or unusual in Respondent's effort to investigate the misconduct before determining that Rosario was to blame. See *Westinghouse*

Electric Corp., 277 NLRB 136, 137 (1985) (reversing judge's rejection of employer's case based on purported flaws in its investigation of employee misconduct where investigation was not "biased, negligent, or cursory").

As further support for finding Rosario's discharge pretextual, the General Counsel argues that I should infer that Respondent did not enforce its mold reporting policy consistently because Rosario is the sole employee who has been disciplined pursuant to it. Considering, however, that there is no evidence of any employee engaging in conduct similar to his, this argument has little force. *St. George Warehouse*, 349 NLRB 870, 879 (2007) (finding no disparate treatment where employee's conduct was unprecedented and therefore no similarly situated employees existed for comparison). Finally, I reject the suggestion that the timing of the discharge decision (1 day before the Anchorage mold ordinance was voted into effect) is somehow suspect; the credible record evidence establishes that Respondent's actions were a direct, timely response to the Union's emailed and online publication of mold images in rooms 826 and 534, combined with the need to accommodate Rader's prescheduled out-of-town trip.

Accordingly, I find that the General Counsel's pretext arguments lack merit and therefore an analysis under *Wright Line* dictates a finding for Respondent.

2. *Burnup & Sims*

The result under *Wright Line*, however, is not dispositive of Rosario's discharge allegation, if, as the General Counsel urges, *Burnup & Sims* is applied. As discussed, supra, that standard's heightened protection dictates that Respondent's reasonable, good-faith belief that Rosario committed misconduct will not exonerate it unless that belief was correct.

Under *Burnup & Sims*, Respondent bears the initial burden to show that it had a good-faith belief that the disciplined employee was engaged in misconduct. As discussed, supra, I have found that Respondent discharged Rosario because it reasonably believed that he covered up and failed to report the mold in rooms 826 and 534. The burden then shifts to the General Counsel, who must prove that Rosario was engaged in a protected activity, that Respondent knew this activity was protected, that the discharge decision was based on alleged misconduct occurring in the course of that protected activity, and that Rosario was not guilty of that misconduct. *Id.* The first two elements are easily established. Clearly, by photographing rooms 826 and 534 on August 19 and providing his images to the Union on August 22, Rosario engaged in the protected conduct of documenting a health and safety condition for publication on the Union's mold website. The record establishes that Respondent had knowledge of this conduct and considered it protected, as evidenced by the repeated assurances Rosario was given during his interview.

The third prong—whether Rosario was discharged based on conduct occurring "during the course" of his protected conduct—presents a closer call. Section 7 clearly protected Rosario's right to document the mold conditions he discovered on August 19. While his "cleaning" and covering up the mold did,

¹⁶ Although I agree with Charging Party that Rosario was, in fact privileged to deny being responsible for the mold photographs, I find this

temporary attempt to deflect blame was not itself the conduct for which he was discharged.

in fact, take place in between his protected acts of photographing it and providing the images to the Union, Rosario's failure to report the mold condition he had concealed continued long after his protected conduct (providing the images to Valadez) had ceased. This was gratuitous and punitive on his part and did nothing to enhance the Union's effort to publicize the Hotel's mold conditions online. Indeed, insofar as Rosario misrepresented his own actions to the Union itself—leading Valades to believe that he had reported the mold—it can hardly be argued that his deception was intertwined with his protected conduct. See *Roadway Express*, 271 NLRB 1238 (1984) (employer lawfully discharged employee who, in furtherance of union's grievance, surreptitiously obtained business records from the employer's office which he then turned over to union steward).

I further find that Rosario's misconduct, even to the extent it occurred within the context of his protected act of documenting mold for the Union, amounted to gamesmanship that went beyond the Act's protection and therefore cannot be considered "part and parcel" with his protected conduct. The Act will not protect conduct that compromises the safety of employees or others, the classic example being a worker who concertedly walks off the job leaving boilers unattended. As one court has put it, "the Act permits employees to exercise self-help, but not in a reckless way." *NLRB v. Federal Sec., Inc.*, 154 F.3d 751 (7th Cir. 1998); see also *Waco, Inc.*, 273 NLRB 746, 746 (1984) (employee wearing large, cardboard pronoun sign on his person while operating machinery unprotected).

There is ample evidence that the presence of mold at the Hotel poses a serious potential health threat to both guests and employees. Moreover, the credible evidence establishes that Rosario was never ordered to conceal the mold in rooms 826 and 534, but did so unilaterally, thereby preventing a workplace health hazard from being properly remediated and compromising the safety of the Hotel's guests and management, as well as that of his own coworkers. I find this conduct recklessly dangerous and therefore unprotected.

Rosario's further act of deception in failing to report the mold condition was likewise unprotected. As the Board has explained:

in certain circumstances, an employee may lose the protection of the Act by engaging in conduct that is deliberately deceptive or maliciously false where there is no necessary link between the deception or falsification and the protected conduct.

Encino Hospital Medical Center, 360 NLRB 335, 335 (2014) (finding that steward lost protection of the Act by engaging in deception that was neither an integral nor a necessary part of her representing coworker); *Ogihara America Corp.*, 347 NLRB 110, 112–113 (2006) (finding union adherent lost the Act's protection where no link between his falsification and his protected conduct), *affd.* 514 F.3d 574 (6th Cir. 2008); *Newark Morning Ledger*, 316 NLRB 1268, 1271 (1995) (finding employee-steward lost protection of the Act where, in the course of his steward

duties, he altered employer's business record to gain advantage for union); *HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 919 (1995) (finding employee lost the Act's protection where no link between her spreading false rumors about supervisor and her concerted activities).¹⁷ Accordingly, I find that, because Rosario's misconduct was temporally distinct from and not integral to his protected conduct, the government cannot establish the third prong of its burden under *Burnup & Sims*. See *White Electrical Constr. Co.*, 45 NLRB 1095, 1096 (2005) "[t]he *Burnup & Sims* rationale does not apply. . . . when employees are not engaged in protected activity) (citing *Yuker Construction Co.*, 335 NLRB 1072, 1073 (2001)).

Finally, even were Rosario's course of conduct properly analyzed under *Burnup & Sims*, application of that decision's heightened standard of protection would not yield a finding of violation. This is because the General Counsel simply failed to establish, by credible evidence, that Rosario did not in fact engage in the misconduct for which he was discharged. Put differently, in order to prevail under this standard, the General Counsel must prove that Rosario's admitted conduct—covering up suspected mold with wallpaper—did not amount to misconduct because it was, in effect, ordered by an agent of Respondent, and further that he did, in fact, report the rooms in question, at least after the fact.

The problem is that the credible evidence fails to support either finding. Rosario's rather implausible inability to recall the identity of the room supervisor he claims directed him to the two rooms, coupled with the General Counsel's failure to adduce this evidence at hearing, leaves unresolved whether this person was, as alleged, an agent of Respondent, as opposed to a character fabricated by Rosario. The burden of proving agency status is on the party asserting that agency status exists, *Food Mart Eureka, Inc.*, 323 NLRB 1288, 1295 (1997); *United Federation of Teachers Welfare Fund*, 322 NLRB 385, 391 (1996); *Millard Processing Service*, 304 NLRB 770 (1991), and conclusory assertions that room supervisors are generally considered conduits of management are insufficient. In any event, by Rosario's own testimony, this mystery individual did not, in fact, order him to cover up mold, but merely to reattach wallpaper under which he later discovered mold, rendering the agency issue largely moot. Nor do I credit Rosario's obscure claim that some unidentified person or persons had historically given him an "order" to clean up suspected mold and glue wallpaper over it. *Operative Plasterers, Local 394*, 207 NLRB 147, 147 (1973) ("[a] trier of fact need not accept uncontradicted testimony as true if it contains improbabilities or if there are reasonable grounds for concluding that it is false"). Finally, I credit Best and find that Rosario, who obviously changed his story about how and when he had reported the mold, never actually did so.¹⁸

In summary, I find that, because the misconduct for which Rosario was discharged did not occur within a course of protected

¹⁷ Treated differently are cases in which the falsification at issue is "part and parcel" of the protected conduct, such as when a steward signs a grievant's name in order to preserve the timeliness of the grievance. See *OPW Fueling Components*, 343 NLRB 1034, 1037 (2004), *enfd.* 443 F.3d 490 (6th Cir. 2006); *Roadmaster Corp.*, 288 NLRB 1195, 1196 (1988), *enfd.* 874 F.2d 448 (7th Cir. 1989)).

¹⁸ Despite having told both management and the Union that the two spoke by phone, Rosario appears to have recalibrated his story for a trial in which telephone records were introduced showing no such call was made.

conduct, and additionally because the General Counsel has failed to demonstrate that Respondent's good-faith belief in Rosario's misconduct was, in fact, mistaken, an application of *Burnup & Sims* standard does not operate to salvage the General Counsel's case.

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended¹⁹

ORDER

It is recommended that the complaint be dismissed in its entirety.

Dated, Washington, D.C. November 14, 2019

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

Board and all objections to them shall be deemed waived for all purposes.